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ACCOUNT OF PROFITS INDEPENDENT OF INJUNCTION.

The question whether equity has jurisdiction to give any money recovery for the infringement of a patent, except after it shall have granted an injunction, is important in cases arising under expired patents. It is admitted that equity has exclusive jurisdiction over all matters of trust, except in cases of bailment and except where *indebitatus assumpsit* will lie. Neither the common nor the statute law gives the patentee the right to an action of *indebitatus assumpsit*, or any other action at law save trespass on the case. If then, the constructive trustee-ship of the infringer exists, equity will enforce it, for the common law has no power to do so. If a man unlawfully uses his neighbors horse and wagon or any of his tangible property, and makes profit therefrom, the common law affords an election of remedies. The injured party may bring trespass or trespass on the case and recover his damages, or he may waive the tort and bring *indebitatus assumpsit* for money had and received, and thus in effect convert the wrong doer into an involuntary trustee.

For the unlawful use of a patent, however, the law affords only the first of these two classes of remedies, and, therefore, equity furnishes the other. That the infringer may be converted into a trustee as to the profits for the owner of the patent he infringes, is a doctrine announced by the Supreme and Circuit Courts of the United States, and repeatedly applied and acted upon by these courts. When it has been announced it has been stated as a general rule, and when it has been applied and acted upon, it has been not only in cases where equity happened also to grant an injunction but also in cases where no injunction was issued. This doctrine was announced by the Supreme Court in Burdell v. Denig,[1] in which case Mr. Justice Miller delivering the opinion of the court said: "In cases where profits are the proper measure, it is the profits which the infringer makes, or ought to make, which govern; not the profits which the plaintiff can show he might have made. Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies eminently and mainly in cases in equity, and is based upon the idea that the infringer shall be converted into a trustee as to these profits for the owner of the patent which he infringes." Mr. Justice Clifford, also, in delivering the opinion of the Supreme Court in the case of Birdsall v. Coolidge,[2] said: "Controversies and cases arising under the patent laws are originally cognizable as well in equity as in law, by the circuit courts or by any district court having circuit powers. Prior to the passage of the act of the 8th of July, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two. He might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such suit being regarded as a trustee of the owner of the patent as respects such gains and profits; or the owner of the patent might sue at law, in which case he would be entitled to recover as damages compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts." The judge further said that the above has been modified by the act of 1870, only to the extent of allowing the complainant to recover damages in addition to profits in certain cases in equity, the profits, however, being recoverable precisely as they were prior to 1870.

The same doctrine was applied and acted upon in the case of Woodworth v. Livingston, decided by Mr. Justice Woodbury in the District of Massachusetts in 1849. No regular reports of Mr. Justice Woodbury's decisions for that year were ever published, but the case was appealed to the Supreme Court, which sent the case back with directions to enter a decree for the actual gains and profits of defendants. In Goodyear v. Rubber Company,[3] the bill was filed to recover the profits derived by the defendant from its infringement of the Goodyear patents, all of

(1) 92 U. S. 720.

(2) 93 U. S. 68.

(3) 2 Fisher, 499.

which expired June 15th, 1865. Mr. Justice Clifford entered an interlocutory decree in November, 1864, but granted no injunction. In Seymour v. Marsh,[4] the bill was filed to recover profits derived by the defendants from their infringement of three patents on harvesters. The patents had all expired before the hearing in the court below, and accordingly the court said: "The complainant's patents having expired, they can have a decree for an account only. To this they are entitled, and it will be accordingly entered." The decree was affirmed on appeal.[5] In City of Elizabeth v. American Nicholson Pavement Company,[6] Mr. Justice Bradley, delivering the opinion of the court, said: "Damages are not sought, or at least are not recoverable in this suit. Profits only as such can be recovered therein." The same questions were substantially presented on demurrer in the unreported case of Sayles v. Dubuque & Sioux City Railroad Company, in October, 1877, before Dillon and Love, JJ., when the following opinion was rendered: "Although the original and extended term of the letters-patent had expired before the suit was brought, we think the bill can be maintained in equity on the ground that it seeks a discovery and accounting for profits made by the defendants' use of the plaintiff's property, which profits, if not trust-moneys, strictly are of that nature, and necessarily require an investigation which a court of law is not so competent to make as a court of equity." The question also arose in the Eastern District of Tennessee, in 1877, in the case of Vaughn v. East Tennessee, Virginia & Georgia Railroad Company. Brown, J., overruled the demurrer and rendered an opinion which has been reported.[7] The same question again arose in the Middle District of Alabama in 1877, on demurrer to the bill of Vaughn v. South and North Alabama Railroad Company, and the demurrer was overruled by Mr. Justice Bradley. The question next appeared in the Northern District of Georgia, in the case of Woods v. Wallace, and was again decided in favor of the jurisdiction by Woods, J., in October, 1877. The question was next brought before the United States Circuit Court for the Eastern District of South Carolina in May, 1878, in the case of Sayles v. South Carolina Railroad Company. Bond, J., there sustained the jurisdiction of equity by overruling the demurrer. In October, 1878, upon the same question, Mr. Justice Harlan on demurrers to three bills then pending in the Northern District of Illinois, delivered the following opinion: "The argument of the counsel for the defendants was put with very great force. I need not intimate what might have been my conclusion of the question were it new, as I am convinced that it is settled law, determined by the weight of authority, that independent of those cases where the account may be had on the ground of the injunction, the jurisdiction is now entertained in the chancery court, on the ground that the party violating the patent is a trustee, and that he holds whatever profits he has made in trust for the patentee." In June, 1879, the question was once more argued before Mr. Justice Miller, in the District of Kansas, in the case of Stevens v. Kansas Pacific Railway Company, when the court sustained the jurisdiction of equity.

It has been contended that it has been the settled law in England that the jurisdiction of equity is dependent solely on an injunction. With one exception, the English authorities cited, all hold that if for any reason the injunction is not actually granted there can be no account. In the exceptional case it was held that by virtue of an act passed in 1858, equity might award damages without an injunction, provided the court had jurisdiction to grant an injunction when the suit had commenced. The next year, however, it was expressly decided that the act in question had no such scope, and that the rule continued as before.[8] In the cases noted below no injunction was granted, but in each of them an account of the infringers profits was decreed.[9]

(4) 6 Fisher, 115.
(5) 97 U. S. 348.
(6) 97 U. S. 126.
(7) 9 Ch. L. N. 255, 1877.

(8) 35 Beav. 561; 35 L. J. Pt. 1,226.
(9) Goodyear v. Rubber Co., *per* Mr. Justice Clifford, 2 Fisher, 449, (1864.) Affirmed by the Supreme Court, 9 Wall. 804 (1869); Seymour v. Marsh, *per* McKennan, J., 6 Fish. 115, (1872), affirmed by the Supreme Court, 97 U. S. (1878); Emigh v. Railroad Co., *per* Drummond, J., 2 Fish. 387 (1863); Sayles v. Railroad Co., *per* Drummond, J., 4 Fish. 584 (1871); Hendrie v. Sayles, 98 U. S. 546 (1879.)

CONTRACTS BY LETTER.

The case of *Household Fire Insurance Company v. Grant*, 27 W. R. 858, L. R. 4 Ex. D. 216, [9 Cent. L. J. 271,] raised a point of great importance with regard to the principle involved. Somewhat similar questions have at various times come before the courts, and we doubt whether the law on the subject can even now be considered as definitely settled, the more so that Bramwell, L. J., dissented from the opinion of the court. We must confess to entertaining a very strong opinion that, whatever the law may be, the common sense of the matter is clear, and that the view expressed by Bramwell, L. J., is consistent with reason and justiee. The majority of the court (Baggallay and Thesiger, L. JJ.) seem to have considered the matter concluded by authority.

The point was briefly this: The defendant applied for shares in the plaintiff company. The company allotted the shares to the defendant and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him. It was held by the majority of the Court of Appeal that the defendant was a shareholder, overruling British and American Telegraph Company v. Colson, L. R. 6 Ex. 108. The case which was considered to be a conclusive authority on the point was Dunlop v. Higgins, 1 H. L. C. 381. There has been a good deal of discussion in this class of cases as to when the contract, if any, is concluded, and at what period the *aggregatio mentium* is complete. It has been said if the contract is not complete upon the letter accepting the offer being dispatched, when is it complete? If knowledge by the offerer of the acceptance of the offer is necessary to complete the contract, it would follow that knowledge by the acceptor of the fact that the acceptance has been communicated to the offerer may be necessary, and so on *ad infinitum*, so that there never can be an *aggregatio mentium*, the parties being apart and not being capable of simultaneous expression of agreement. Such is the argument employed in Dunlop v. Higgins.

We can not help thinking that under cover of loose metaphysical expressions and ideas such as "*aggregatio mentium*," a good deal of unnecessary perplexity is sometimes introduced. It seems to us that there may be a lurking fallacy in the notion that an *aggregatio mentium* necessarily constitutes a contract in the legal sense of the term, arising from an absence of distinct idea of the meaning in which the term *aggregatio mentium* is used. It is generally necessary to a contract, no doubt, but "contract" as used in this relation means obligation binding in law. There is sometimes a contract without any *aggregatio mentium* at all. One party may not have meant the same as the other all along; and yet there may be a contract. The real question is: When does the contract become legally obligatory on the party sought to be charged?—not till then does it become a contract in any efficient legal sense of the term. It seems to us possible that the *aggregatio mentium* may in some cases be antecedent to the time when the contract becomes binding on the offerer, though, of course, this depends somewhat on what is meant by *aggregatio mentium*. We should say the only practical meaning of the term is assent of two minds to the same terms. Of course, if it is merely the Latin for "contract," the whole question is begged.

In this point of view we do not see any such very great difficulty as has been suggested in supposing that the contract by the offerer does not arise until the acceptance has been communicated to him. The party accepting knows that he has accepted and has taken steps to communicate his acceptance; it may be said that, therefore, he ought to be bound unless and until he ascertains that the mode of communication he took failed; he is not entitled to say that there is no contract until the other party has received the communication. He knows of the *aggregatio mentium*; the other party by hypothesis does not. The question really seems to resolve itself into this: Can a party be bound by a contract of which he does not know, and *ex hypothesi* may be unable to know, the existence? In other words, can a man have promised in the legal sense without knowing that he has promised? If it be correct that the contract is completely binding directly the letter of acceptance is despatched, then, assuming some cause that should absolutely prevent the delivery of the letter, the contract, nevertheless, is good. One can not understand any principle on which a person ignorant of the existence of the *aggregatio mentium* is to be affected by the same legal obligations as if he knew of it, except on the ground of *laches* on his part or that of his agent.

And here comes in a very remarkable point in the discussion. There seems to have been some such train of reasoning present to the minds of the judges in the various cases; and those who maintain the view of the majority in the case we are discussing seek to make the post office the agent of the party to whom the letter is sent. We can not understand this as a plain matter of fact. It is the plain truth that the post office is the agent of the sender, so far as it is agent of either party, and it seems to us the extreme of far-fetched theory to treat the postman as a messenger sent by the offerer of the proposal to bring back the answer. There was some talk in Dunlop v. Higgins of the usage of trade, and of implied authority to return an answer by post when the offerer must have contemplated an answer by post. With all respect for the eminent persons who used these expressions, if we must call a spade a spade, we should not call them good sense. People communicate by post because it is convenient in all the relations of life. There is no usage of trade that if a person replies by post it shall be sufficient acceptance, nor is there any implied authority in the matter. Any implied authority in the sense of the term "implied" for which we have always streuously contended—viz., any such authority actually in the necessary contemplation of the parties' minds—there clearly is not. Can any sane person suppose that a person writing for an allotment of shares really means in his own mind

that he is making the post office his agent in the sense that delivery of an answer to the post office is delivery of an answer to him? Surely not. We are confident that if the case were put in any company there would not be a single person, not a lawyer, who would not exclaim at the injustice of making a person a shareholder in a company without his knowledge because a letter had been posted which had never reached him.

Then, with regard to implication of authority by law, such an implication may be made when natural justice or convenience dictates it; as when of two parties, both innocent and unfortunate, one has conduced to the mischief more than the other, for instance where a person held out as a general agent has exceeded his actual authority. But we want to know why the offeror is to be held to take upon himself the risks of the post office? We should have thought it a truism to say that that person must bear the risks of the post for whose convenience it has been employed. Conceive an offer of a contract; assume it to have come by post. The party sending it would have suffered if the post had failed, so far as the offer not reaching me is concerned, because the means of communication he employed would have failed. It is just as if he had shouted to me from a distance, but the distance being too great, or his voice being weak, the purport of what he said had never reached me. Why should there be any difference in this respect with regard to the answer?

But assuming, in some way or other, an offer to have come to me; it is immaterial how. I have to accept the offer if I wish to do so, and notify my acceptance. If I sent a messenger of my own, clearly I should take the risk of his failure. Why should I be placed in a different position because, for my own convenience, I employ the public message carrier? The case of notice of dishonor of negotiable instruments does not seem to us conclusive, or indeed, in reality, at all analogous. The true rule on that subject may be, not that the holder is bound to give notice of dishonor in the sense that the notice must reach the prior indorser, but that he ought to take reasonable means to inform him of the dishonor, which reasonable means, by usage of trade, are so-and-so. It is obvious that this question is wholly different from the question whether a man can be bound by a contract which, *ex hypothesi*, he can not know to exist. It seems to us, as we have before said, that a fallacy may have crept in in this way, viz., that it has been assumed that the contract is necessarily complete in the sense that there must be a contract legally binding both parties directly the *aggregatio mentium* (by which we mean merely the agreement of the two minds as to terms) is complete. If *aggregatio mentium* constitutes a contract and merely means the assent of two minds to certain terms evidenced by overt acts on both sides, clearly it would be sufficient if the party to whom the offer was made wrote an assent and never sent it at all, but, intending to post it, dropped it into some hole which was not a letter-box by mistake. This shows either that *aggregatio mentium* is not complete without communication of it, or that *aggregatio mentium* alone will not constitute a contract. This is in effect what Bramwell, L. J., says when he lays down the proposition that assent to the proposal or acceptance is not enough, but there must be communication of assent to the proposer. This being so, in order to make the posting of the letter such a communication, you must make the post office the agent of the offerer, which, for the reasons above given, seems to us contrary to plain facts and justice.

We feel doubtful whether the best expression of the rule is as the lord justice lays it down, though, for the purpose for which he used it, the definition was sound enough. It does not seem to us clear that the contract does not arise until the communication of the acceptance of the proposition reaches the offerer. Suppose the letter came to the address he gave, but he had gone out of town without making provision for having his letters forwarded? It seems to us that if the offer is accepted the contract becomes binding on the offerer if the acceptance would have been communicated to him but for his own default, assuming, of course, that the communication would have been in time. We believe that on a thorough analysis it would appear that the true question in these cases is—assuming that there would have been a contract if the acceptance of the proposal had been known to the proposer—whose fault is it that he did not know? We doubt whether it can be solved by a general rule. It seems to us that the circumstances might vary greatly, and in some cases there might be sufficient to make it the offerer's duty to inquire further as to the fate of his proposal; but generally it would lie on the acceptor of it to insure his acceptance being made known.

It was held by the majority of the court in *Household Fire Insurance Company v. Grant*, that they were concluded by authority. We wish to make a few remarks on the authorities. The great authority relied upon was the case of Dunlop v. Higgins, 1 H. L. 381. Before discussing that case we should wish to deal with some of the authorities upon which the judgment professes to be based. We have already incidentally given reasons why the authorities on notice of dishonor of a negotiable instrument are not really *in pari materia*. The case of Adams v. Lindsell, 1 B. & A. 681, was relied on. When that case comes to be looked at, it is clearly a right decision, but it turns on grounds which make it no authority on the subject we are discussing. The offer there was misdirected, and consequently the answer accepting the offer did not arrive until two days after the offer was sent. The defendant not receiving an answer so soon as he expected, sold the goods elsewhere. It seems to us clear that a party who has sent an offer, though he may withdraw it before there has been *aggregatio mentium*, can not treat it as withdrawn without intimation to the person to whom it is sent until the time within which it ought to be accepted has passed. It was, in Adams v. Lindsell, the offerer's own fault that the offer reached the party to whom it was sent later than he expected, and therefore

the answer was delayed. Unless he retracts the offer the offerer must be considered as continually making it for a reasonable time—*i. e.*, if the answer accepting arrives in reasonable time the offer must be considered as continued up to that time. What is a reasonable time would depend on the circumstances. Even if a letter went astray through the *laches* of the offerer, it would not be reasonable, if it was delivered six months afterwards, for the offeree to treat it as a subsisting offer, but if a slight delay occurred through the *laches* of the offerer or any person for whom he was responsible, then it might be reasonable that the offeree should treat it as a subsisting offer. The *dicta* of the Queen's Bench in Adams v. Lindsell, on which such reliance has been placed, seem to be directed only to meeting the argument that because there could be no agreement binding on the offerer until he received an answer to his offer, therefore he might act as if no offer had been made, and, without any withdrawal of the offer, sell the wool to a third party. There may be a reasonable time during which the offerer is bound to wait for an answer, otherwise transactions by letter never could take place. If the answer comes in such time he is bound by the contract. That, surely, is an entirely different thing from saying that if by no fault of his no answer can reach him, he is bound. By making the offer and leaving it unwithdrawn, he has laid himself open to a contingent liability in the event of the other party accepting during a reasonable period, for the acceptance of such offer. If, during such period, the offer not being withdrawn, the other party accepts it, the offerer will be bound on receipt of the answer accepting the offer.

Some of the expressions in Adams v. Lindsell, may seem to point to the contract being complete before the arrival of the answer, but it is obvious that the court was not dealing with such niceties as prove to arise in the subsequent cases. All they appear to mean is that the acceptance by the person to whom the offer was made bound the offerer in the sense that he could not then withdraw the offer. We do not believe there is anything in the judgment (which, it should be noticed, is merely a summary or "*per curiam*"), which amounts to saying that the contract, so far as it was to bind the offeror, was complete when the letter was posted. On the points that may arise with regard to the right to withdraw the offer, we shall say a few words farther on.

With regard to Dunlop v. Higgins, there, again, it was a question of delay in the receipt of the answer. There the answer, though posted in due time, did not arrive in the ordinary course of post through delays in the post. It seems to us that the judgment rather goes on the assumption that there was a trade usage that if a letter was duly posted the same day that was all that was required of the party to whom the offer was made. What does this, when analyzed, come to but that, in estimating the reasonable time within which the acceptor has to accept, and notify his acceptance of, the contract, it is to be considered that he does so in reasonable time if he posts the letter on the same day, whatever delays may take place in the post? We admit that the case goes very near to establishing the proposition that the post-office is the agent of the offerer, but when strictly looked at, we think it falls short of quite laying this down, even as an *obiter dictum*. The proposition being that the acceptor is to communicate his acceptance within a reasonable time, the judgment answers that such time as the post may take to deliver the answer posted on the same day is a reasonable time. This is obviously quite a different thing from saying that if no communication of acceptance is ever in fact made at all, the offerer is bound.

Another case which was relied on as an authority in the case we are discussing, is Harris' Case, 20 W. R. 690, L. R. 7 Ch. 587. Here, again, the answer was received allotting the shares, but while it was on the way the applicant had written a letter declining to take shares. This, again, does not seem to us to be an authority for the decision in the case now under discussion. Mellish, L. J. in giving judgment, certainly used expressions tending to show that the contract was complete on the posting of the letter of acceptance, and gives various illustrations of the difficulties there would be if it was not so. But we think that all these suggested difficulties really are consequences that would arise from holding that the offerer can withdraw the offer in the interval between the posting of the letter and its receipt by him. We think he can not so withdraw it, but that does not seem to us to necessitate holding that there is a complete contract on its posting.

If we are right in this, a merchant can, in general, safely act on the offer when he has accepted it, because the post generally, in fact almost always, goes right. The decision in Dunlop v. Higgins, makes him the more secure in this respect. But to say that business must come to a standstill because in very exceptional cases the letter may miscarry, altogether seems to us going too far. It is sufficient protection that directly the letter is posted the offerer can not withdraw. We do not believe the contract is complete until the letter is received by the offerer, but the process of completion may be going on without his power to stop it. To put it in another way, it seems to us that "acceptance of the offer" for this purpose consists of a process involving two elements—the assent in one party's mind, and the communication of it to the other party. As soon as the process begins the right to withdraw the offer ceases, for the process must be regarded in law as, for this purpose, indivisible. This is obvious justice. There can be no difficulty, as far as we see, in saying that if the process is completed the contract must be considered to exist from its commencement; that is quite different from saying that commencement is equivalent to completion.

But then the difficulty is raised that the rights of the parties are in effect fixed at the date of the acceptance, and not of the communication of it; and it is asked, can a contract have a relation

back, as in the case of relation to an act of bankruptcy? We do not think men should be frightened by vague phrases. It is really no question of relation back in the same sense as in bankruptcy. The contract may not arise until the communication of the acceptance, in the sense of a binding legal obligation, but the agreement as to what the rights of the parties are to be may be antecedent. The sort of case suggested is, for instance, if the company made calls while the letter of allotment was on its way. It would only be in extraordinary cases that such a thing could occur; but we should say that the reasonable construction would be that the contract, when it became of legal obligation, was that the party should be a shareholder as from a certain date. No cause of action on the contract can arise until the legal obligation is complete; but why is there anything absurd in the supposition that parties may contract as from a period antecedent to the arising of the legal obligation? If you will allot me shares, and so entitle me to the profits of the company as from the date of allotment, I will share its liabilities from that date. Why, because the contract to this effect does not arise until a date after the allotment, is there any relation back such as in bankruptcy? The suggestion lurking in the comparison to bankruptcy is that people's vested rights may be overridden by *ex post facto* matters; but there is no analogy between the two things.

It seems to us, summing up the whole case, that the question is, of two innocent parties, one of whom must suffer loss or inconvenience, which is to suffer? We think the one who trusted the post-office. And who trusted the post-office? We should say, plainly, the sender of the letter.

LIABILITY OF SLEEPING CAR COMPANIES.

DIEHL v. WOODRUFF.

Indianapolis Superior Court, General Term, January, 1880.

1. Sleeping car companies are neither common carriers nor inn-keepers, but they are bound like other bailees to use ordinary care, which must be in proportion to the danger, and consequently greater in the night while the passenger is asleep than in the day time.

2. The fact that articles or money lost or stolen from the passenger, were carried by him about his person or under his personal supervision, does not exonerate the sleeping car company from the duty to use ordinary care in respect to them; but the right of recovery is limited to such articles as it is usual and proper for a traveler to carry about his person, and to such a reasonable amount of money as it may be proper for him to carry for his traveling expenses.

HOWE, J., delivered the opinion of the court:

The questions raised by this appeal arise upon a special finding of facts and conclusions of law. The plaintiff sued for the loss of a watch valued at $172, a chain valued at $50, and $111.50 in money, stolen from him while traveling in one of defendant's sleeping cars, and got judgment for $396, which included the value of the articles stolen and interest at the rate of six per cent. from date of loss, from which defendant appeals.

The first question in the case is as to the nature and limits of defendant's responsibility to passengers. There are not many decided cases upon this question. Most of them are collected in 13 Alb. L. J. 221, and 19 Am. Rep. 458, note. See, also, Hutchinson on Carriers, 45-47, note. A leading case is Pullman Palace Car Co. v. Smith, 73 Ill. 36, 5 Cent. L. J. 54, 24 Am. Rep. 258. It seems to be settled by the authorities that sleeping car companies are neither common carriers nor innkeepers. If, however, there exist reasons of public policy which require that as stringent rules should be applied to sleeping car companies as are applied to common carriers or innkeepers, the names can make no difference. There were other bailees at common law—as, for example, sheriffs and jailers, who, with respect to debtors in their custody were held to the same liability as that of common carriers and innkeepers. 2 Kent, 12th ed. 603. And it may be worth while to observe that at least one of the principal reasons for the strict rules of the common law with respect to common carriers and innkeepers—a reason founded in public policy and as cogent now as it ever was—applies with equal or greater force to sleeping car companies. Without undertaking, however, to define with precision the character and limits of the liability of sleeping car companies to their passengers, it is sufficient for the purposes of this case to assume, what I suppose will be conceded, that they are, like other bailees for hire, bound to exercise at least ordinary care with respect to the passenger and his baggage.

But how it is in regard to such articles as a passenger usually carries about his person, or in his immediate possession and under his personal supervision? It may be that, as to such articles, even common carriers are exempt from the strict liability as insurers, and that they are not bound even to show affirmatively that the loss of them was not owing to their negligence. The authorities are not harmonious even as to cases where the articles are stolen in the day time, nor as to cases where, if stolen in the night time, the carrier did not, as part of the contract, agree to furnish sleeping accommodations. See Hutchinson on Carriers, §§ 689, 700. Id. § 58, p. 42, note 5; Id. §§ 85, 86; Wharton on Negligence, §§ 599, 600; Kingsley v. Lake Shore etc. R. Co. 125 Mass. 54, s. c. 28 Am. Rep. 200.

But as to cases in which the carrier, as part of the contract, agrees to furnish sleeping accommodations, and the articles are stolen from the passenger in the night time during the usual hours of sleeping, and without contributory negligence on his part, the weight of authority seems to be that the carrier is liable, if not as insurer, at least for the failure to use such a degree of care as the contract naturally implies. This may be only ordinary care, but here, as in other cases, ordinary care must be care in proportion to the danger reasonably to be apprehended. This of course is

greater in the night while the passenger is asleep, than it is in the day time when he is awake and can look out for himself. The passenger himself is guilty of no negligence, when he has contracted for sleeping accommodations, in going to sleep. That is what he has contracted for the privilege of doing—what he pays for. The carrier knows this and contracts on the same understanding. The carrier knows that the passenger can not sleep and exercise any care at all, and that he is trusting his person and the goods or money over which when awake he exercised personal supervision, implicitly to the care of the employees of the company. The carrier may, perhaps, restrict his liability for such baggage as the passenger does not need to have about his person, by providing a particular place in which the passenger shall deposit them while asleep, but the carrier is bound to do this or use ordinary care to guard them in the place assigned to the passenger in which to sleep, during sleeping hours and while he is asleep. Particularly is this so in regard to articles which it is necessary or convenient to have about him constantly. These would certainly include his ordinary wearing apparel, and perhaps a watch and reasonable traveling expenses, which most passengers would be very reluctant to part with on retiring to sleep, even if a special place of deposit should be provided.

The question as to the liability of common carriers to passengers for loss of articles carried about the person or in the immediate possession of the latter, in the night time and during sleeping hours, has often arisen in actions against ship and steamboat companies, and while the authorities are by no means harmonious, I think the best considered of them will be found to sanction the views above stated. See Hutchinson on Carriers, 698-700; Crozier v. Boston etc. Co., 43 How. Pr. 466. Much the same liability seems to be imposed upon sleeping car companies. See Blum v. Southern Pullman Palace Car Co. 3 Cent. L. J. 591; Palmeter v. Wagner, 11 Alb. L. J. 149. See also 13 Alb. L. J. 221; Hutchinson on Carriers, 47 note, and the very able dissenting opinion of Smith, J., in Welsh v. Pullman etc. Car Co. 43 N. Y., (S. C.) 457. The authorities, however, limit the right of recovery to such articles as are usual and proper for a traveler to carry about his person, and to such a reasonable amount of money as may be proper for him to carry for his traveling expenses.

Applying the principles above stated to the case at bar, I am of opinion that the judgment of the special term was correct. The evidence showed pretty conclusively that the plaintiff's watch and chain and money were stolen by an occupant of the same car, in the night and during sleeping hours. The only employees of defendant about the car at any time were the conductor and porter; for a distance of eighty-four miles the conductor was absent, having left the train altogether, leaving no one about the car but the porter, who was engaged chiefly in blacking boots in a room in the end of the car. It seems in fact that it was no part of the porter's duties to protect the passengers against thieves, so that during the conductor's absence, the sleeping car must have been a sort of paradise for pickpockets to prowl about in at pleasure.

The amount of recovery was not too large. The items for which judgment was given were no more than usual and reasonable for a traveler to carry.

I am for affirming the judgment of the special term.

ELLIOTT, J., concurs; HOLMAN, J., who sat at special term, not voting.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF STOCK TO OBTAIN CONTROLLING INTEREST.

FOLL'S APPEAL.

Supreme Court of Pennsylvania, November, 1879.

F contracted to sell and G to purchase fifteen shares of stock in a National bank, which were necessary to give G control of a majority of the stock. F refused to deliver the stock. *Held*, that this was a contract of which, for reasons of public policy, equity would not enforce specific performance.

Appeal from the Common Pleas of Erie County.

Bill in equity filed by R. M. Greer against John W. Foll, to compel the specific performance of a contract for the sale and delivery of fifteen shares of stock in the First National Bank of North East. The facts appear in the opinion.

John P. Vincent (*C. B. Curtis* with him), for appellants. The case is not within the exceptions to rule that equity will not decree specific performance of contracts relating to personal chattels. No contract for the sale of stock has ever been so enforced in this State. McGowin v. Remington, 12 Pa. St, 56, was a case of trust, not of contract. The purpose of the contract contravened public policy to an extent that deprives complainant of every equitable claim to have it specifically enforced. If it was a legal contract complainant has an adequate remedy at law for the damage sustained.

Brainerd and *Davenport* (*Benson* and *Griffith* with them), *contra*. This stock is limited. There was none in market. It has no market value. When sold private negotiation fixes the price. An action at law against Foll, the only party in default, would afford no compensation for loss and risk on shares bought of others in pursuance of Greer's legitimate purpose to acquire a controlling interest. No redress is adequate that does not place the appellee in possession of all the rights contemplated by the purchase, and that can be done only by delivery of the stock. Equity will decree specific performances in all cases where the party has no adequate remedy at law, and the thing in specie only will meet the demands of justice. 1 Story's Equity, 680; Pomeroy on

Specific Performance, 9; Phillips v. Berger, 2 Barb. 610; Stuyvesant v. Mayor, 11 Paige, 415; Weir v. Mundell, 3 Brewst. 594; Bank of Kentucky v. Bank, 1 Pars. Eq. Cas. 220; Sank v. Union Steamship Co. 5 Phila. 499; Todd v. Taft, 7 Allen, 371; McGowin, v. Remington, 12 Pa. St. 56. Equity will decree specific performance of a contract to transfer railway shares upon the ground that railway shares are not always obtainable in market. 1 Redfield's Law of Railways, 132; Fry on Specific Performance, 53, 47; 1 Story's Equity, 690; Duncuft v. Albrecht, 12 Simons, 189. This is a contest between individuals over private property. The question of public policy has no place in the discussion.

PAXSON, J., delivered the opinion of the court:

This case presents some extraordinary features. We have nothing like it in this State since equity powers were conferred upon the courts. It was a bill to compel specific performance of a contract for the sale and delivery of fifteen shares of the stock of the First National Bank of North East, under the following circumstances: The bank in question is situated in North East, Erie County, Pennsylvania, and has a capital of $50,000, divided into five hundred shares of $100 each. R. M. Greer, complainant below and appellee, is a merchant in North East, and at the commencement of the year 1877, owned ten shares of the stock of the bank in question. His mother owned sixty-five and his brother owned forty. About that time R. M. Greer conceived the idea of getting enough of the capital of the bank to control it, and to carry out this plan made an arrangement with his uncle, E. C. Custard, and E. E. Chambers, an operator in oil, to raise sufficient money to buy a controlling interest. They succeeded in buying a considerable amount of the stock, mostly on borrowed capital, but still lacked the few shares necessary for control. John W. Foll, the appellant, had the requisite number, and on March 7, 1877, Greer and Foll entered into the following contract: "I hereby agree to purchase fifteen shares of the First National Bank of North East, from John W. Foll. The price to be paid is to be $2.110.65, and interest from July 20th at ten per cent; said stock to be delivered before the second Tuesday of January. 1878." This contract was in writing, and signed by the parties. Before the time arrived for delivering the stock, Foll informed Greer that he would not deliver it. Foll then made a tender of the money specified in the contract. This bill was then filed and referred to a master, who made his report, recommending a decree for specific performance. Exceptions were filed to the report by Foll, which after a hearing were dismissed by the court below, the master's report was confirmed, and a decree entered commanding Foll to transfer to Greer the shares of stock referred to. From this decree Foll entered an appeal to this court

The avowed object of the purchase of the stock and the filing of this bill was to get the control of the bank for Greer and his friends. This appears upon the face of the bill, and is the main ground upon which equitable relief is asked. While the primary object was to obtain the control of the bank, there were at the same time secondary objects. As a part of the plan, the said R. M. Greer was to be made cashier, and Custard and Chambers, before mentioned, were to be directors.

The general rule is that equity will not enforce specific execution of a contract relating to personal chattels. 3 Parsons on Contracts, 364. This is so even in England, where the equity jurisdiction is much broader than in this State. The reason for the rule is, that for the breach of a contract of sale of personal chattels there is an adequate remedy at law. A jury can be in no doubt as to the proper measure of damages. This is especially true of stock and public securities which have a known market value. The disappointed purchaser can go into the market and purchase a coresponding number of shares of the same stock.

To this general rule, however, there are exceptions. An article of personal property may have certain qualities not common to other articles of like description, or may have an especial value by reason of its antiquity, family association or the like. A number of instances are collected in McGowan v. Remington, 12 Pa. St. 61. They are title deeds of an estate and other muniments of property; an antique silver altar piece; Duke of Somerset v. Cookson, 3 P. Wms. 389; an ancient horn, the symbol of tenure by which an estate is held; Pusey v. Pusey, 1 Ves. 273; heir-looms; Macclesfield v. Davis, 3 Ves. and B. 18; and even a finely carved cherry stone; Pearne v. Lisle, Ambler, 77.

I know of no instance in this State in which a court of equity has decreed specific performance of a sale of stocks. McGowan v. Remington, *supra*, which was cited on behalf of the appellee, is not in point. The specific chattels in that case, whose return was sought to be enforced, consisted of a surveyor's maps, plans, and papers of like character. They manifestly came within the exceptions noted, and besides it was a clear case of trust. But we need not pursue this subject further, as the case in hand turns upon a different principle.

While the legal right of the complainant to buy up sufficient of the stock of this bank to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of equity will lend its aid to help him. A National bank is a *quasi* public institution. While it is the property of its stockholders, and its profits inure to their benefit, it was nevertheless intended by the law creating it that it should be for the public accommodation. It furnishes a place supposed to be safe, in which the general public may desposit their moneys, and where they can obtain temporary loans upon giving the proper security. There are three classes of persons to be protected: The depositors, the noteholders and the stockholders. We have no intimation that the bank, as at present organized, is not prudently and carefully managed. The stock as now held is scattered among a variety of people, and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest

earnings invested in it; the depositors who use it for the safe-keeping of their moneys, or the business public who look to it for accommodation in the way of loans, are to be benefitted by the concentration of a majority of its stock in the hands of one man, or in such way that one man and his friends shall control it. Especially is this so when an attempt is made to control it by the use of borrowed capital. The temptation to use it for personal ends in such cases are very strong. It is a fact to which we can not close our eyes, that the financial wrecks of such institutions with which the pathway of the last few years is so thickly strewn, are the result in a great measure of personal management. This purchase has not even the merit of being an investment on the part of the plaintiff. When a man buys and pays for stock with his own money it may be regarded as an investment. When he buys it upon credit, or pays for it with borrowed money, it is a mere speculation.

Were we to affirm this decree, I see no reason why we may not be called upon to use the extraordinary powers of a court of equity to assist in miscellaneous stock jobbing operations. A person who is attempting to make a "corner" in stock, or in any article of merchandise, who had made his contract with that end in view, might with equal propriety call upon us to decree specific performance thereof. But the decree of a chancellor is the exercise of a sound discretion; it is of grace, not of right, and will never be made where the equity and justice of a case is not clear.

We are in no doubt as to our duty in the premises. We are of opinion that the end sought to be attained by this bill is against public policy, and for that reason we refuse our aid.

The decree is reversed and the bill dismissed, at the costs of the appellee.

LIABILITY OF STREET RAILROAD COMPANY FOR INJURY FROM UNSAFE STREET.

McMAHON v. SECOND AVENUE R. CO.

Court of Appeals of New York, November, 1879.

1. A street railroad company agreed with the city to keep the street in and about the rails in repair. A trench being dug by a private party, licensed by the city, across the street, the company in order to pass its cars bridged it over with timbers. In driving over this structure in a cart, plaintiff was injured by the joists separating. *Held*, that the company was liable, both by reason of its contract with the city, and because it undertook to bridge the trench and did not do so properly.

2. The contract between the city and the company provided that the latter should keep in repair the street "in and about" the rails. *Held*, that one foot outside the rails was within these words.

Appeal from judgment of the general term of the Supreme Court in the Second Judicial Department, affirming a judgment in favor of plaintiff, entered upon a verdict. Reported below, 11 Hun, 347.

This action was brought to recover damages for injuries alleged to have been sustained through defendant's negligence. The facts were substantially as follows: On the 4th of February, 1876, plaintiff was driving a truck up Second avenue, in New York city, upon the up or right hand track of defendant's railroad, the right or off wheels of the wagon running in the groove of the eastern rail, and the left hand wheels running outside of the left hand rail of the up-track, between the up-track and the down-track, which, at this point, were about seven feet apart. As he approached Seventy-eighth street, there being no intimation of danger, the left hand wheels of the truck broke through a covering or bridge of planks and beams, which had been built by defendants over a trench running under the street, and which was concealed at the time by a covering of snow; plaintiff was thrown from the truck to the ground and sustained the injuries complained of.

It appeared that one Riss, under a permit from the city authorities, had made this excavation for the purpose of connecting his house with the sewer. He had notified defendant, in advance, that he was going to dig under its tracks; whereupon the railroad company took up the street pavement for six or seven feet on each side of the trench from the space between its tracks, and laid down planks or joists, which were about twenty feet long and from three to five or six inches thick. The point at which the truck broke through this covering or bridge was about one foot from the westerly rail of the up-track, and the edges of the joists or planks were split off as the wheels went down between them. Plaintiff offered in evidence a contract between defendant and the City of New York, by which it was agreed that defendant "should pave the streets in and about the rails in a permanent manner, and keep the same in repair, to the entire satisfaction of the street commissioners." The contract was objected to by defendant's counsel, objection overruled and exceptions taken. Further facts appear in the opinion.

FOLGER, J., delivered the opinion of the court:

There is no doubt but that the cause of the injury to the plaintiff was the making of the excavation in the street; and neglecting to so cover it that loaded vehicles could pass over it in safety; or in neglecting to warn and turn away loaded vehicles from attempting passage there while it was insufficiently covered. There is no claim or pretence that the negligence of the plaintiff contributed to the injury.

In this state of facts it may be that the municipality, having authorized the excavation and having notice that it was going on, and Riss, the person who actually made and left it, were each liable to the plaintiff for the injury suffered. It is not needed that we pass upon that. The question now is, does anything appear on the record which makes the defendant liable to the plaintiff? A liability may arise in two ways: First, from the

defendant's having contracted with the municipality to do, instead of it, the duty which was upon it, to keep the street safe for the passage of the public; and by neglect to do that duty, having given cause of action against the municipality for neglect; then action will be directly against the defendant therefor, instead of first against the municipality, so as to avoid circuity of action. City of Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; and second, from the defendant's voluntarily interfering and undertaking to make the way safe, and so inefficiently doing it as to leave it unsafe, and, at the same time, so as to permit and tempt passage over it.

For the purpose of showing the first named of these grounds of liability, a contract was put in evidence, between the defendant and the municipality, by which the defendant agreed to keep the streets in and about the rails in repair. The phrase in the contract is this: "Shall pave the street in and about the rails in a permanent manner, and keep the same in repair;" and we think that "the same" which is to be kept in repair is "the street." It is plain that the street was not in repair at the place where the wheels of the plaintiff's truck went down. The phrase "keep in repair" is to be construed with reference to the object to which it has been applied. To keep a street in repair is to have it in such state as that the ordinary and expected travel of the locality may pass with reasonable ease and safety. A street in a city is not kept in repair, if it is founderous, or has in it a trench, into which carriages may go and harm follow. The duty to keep in repair is to be performed at once, on the arising of the occasion for repair, or the doing of it put off for a reasonable time, if the nature of the occasion warrants delay. In the latter case the duty to keep in repair carries with it the duty to guard the public against harm from the repair being delayed. This may be done by placing barriers by day, and barriers and lights by night, about the defective place; or some temporary expedient, sufficient for the time, may be used, such as a bridge over the opening or founderous place. Neither of these things were effectually done by the defendant. Was it under the duty to do one or the other of them? We think that it was. Beach v. Crain, 2 N. Y. 86. We have seen that it was under the duty to keep the street in repair, but not the whole of the street. Only that part "in and about" the rail. Clearly all the space within the defendant's rails fell within its agreement. Now the defective place in the street was within the two outside rails of the defendant's tracks. But we need not put so wide a construction as that upon the agreement. "In and about" the rail means, at least within the two rails of each track, and some space outside of each rail. Beyond doubt, it means so far outside as the street surface was disturbed in the act of laying the track. No evidence was given how far such space extended, so that requirement can not be applied here with exactness. In the absence of such evidence, the word must have a reasonable interpretation, and be let to cover so much ground as it would be fair to consider would be used by the defendant, from time to time, for its purposes of repair to the tracks, and the like. The proof was that the off-wheel of the truck of the plaintiff were in the groove of one rail, and that the near-wheels were outside the other rail about one foot. Now, a space of twelve inches from the outside of each rail is not too great to be taken as the extent to which the defendant used the street, outside each rail, in laying their track and, from time to time, in repairing it. It is not an unjust or strained interpretation that "about the rails" includes as much of the street as one foot outside of them.

Nor do we think that the fact that Riss was the licensee of the city to make the trench absolved the defendant from liability to protect the public. The contract with the city was made in view of all the customary uses to which the streets and their appendages are put, from time to time. That contract put the defendant in the place of the city, to repair the streets after such use, if they then needed repair, and to guard against harm while they necessarily remained out of repair. Now, one of the appendages of this street was the main sewer through it; and one of the customary uses of the street was to make and enjoy side drains into that main sewer. Almost as necessary to a property owner on the street, is a use of the main sewer, as is a use of the street; and almost as frequent and continuous. And the contract contemplated that use; and the means customary to avail thereof. And for repair of damage to the street, arising therefrom, the defendant undertook with the city. It will not be denied that the defendant is bound to keep in repair from the use of the street with teams and vehicles; nor but that, although the city is also bound to do the same, the defendant is liable to one harmed by a neglect to repair. It is just as much bound to repair, or protect from want of repair, when the need of repair arises from a lawful, customary, anticipated and probable use of the street, though not as frequent, nor by such multitude of people. There was then the duty upon the defendant, to the public and to this plaintiff, to keep the street in repair, just at the place where his wheels went down or to warn away therefrom.

This duty was not efficiently performed. It was undertaken, and in such way as to lead the plaintiff to suppose that passage there was safe. Two planks, or joists, or timbers were put down, in size seven inches by five inches, with the seven inch side up. That made a width of fourteen inches. It is probable that the material was sufficient in strength to bear a heavy vehicle. The defect seems to have been in the infirmity of the fastening them in place; for the timbers did not break, but the wheels went between them, tearing off the edges of them; and it would seem that the outer one slid away from the inner one, under the weight of the truck, and that thus it was let down. The neglect was in not fastening the timber at first, or in not again fastening it, when the adjoining surface of the street had fallen into the trench. Thus it appears that the duty was upon the de-

fendant to keep that place in the street in repair; and that there was enough in the evidence to warrant the jury in finding that there was negligence in performing it.

But the other ground of liability also exists. The defendant knew of the existence of the dangerous place. Grant that it was not bound to repair it; yet it had a right to make it passable for its own vehicles and teams. The exercise of this right carried with it a duty. In the exercise of it it was bound not to harm others or lead them to harm. The defendant volunteered to make passage safe over the excavation. In attempting so to do, it gave the place the appearance of safety, while, as the event proves, it was really insecure, delusive and misleading. It would have been better for the plaintiff had the defendant left the trench made by Riss altogether uncovered; for the open gap in the roadway would have been apparent to him, and he would have avoided it. By undertaking to make a safe way of passage, and failing to entirely do so, and yet making the show of a safe way, the defendant misled the plaintiff to his harm, and must answer to him for his damage. They had a right to do what they did, had they done it well. It was necessary for the use by them of their own property. But having begun, they were bound to do it in a proper manner for the public. Manley v. St. Helen's Canal Co. 2 H. & N. 840; Drew v. New River Company, 6 C. & P., 754. The defendant is, upon general principles and upon the facts of the case, liable to the plaintiff. It remains to be seen whether there were any errors in the conduct of the trial calling for a reversal of the judgment.

There was no error in admitting in evidence the agreement between the defendant and the municipality. That was material and proper, to show that there was undertaken by the defendant the duty which lay primarily upon the city to give the public, and the plaintiff, as one thereof, a safe passage through the thoroughfares. The reception of the agreement in evidence did not change the cause of action from one arising in tort to one based upon contract. It showed the duty of the defendant, and made applicable the other facts of the case, to show its negligence of duty, wherein it was tortious.

It follows from what we have said that it was no error not to charge that it was not the duty of the defendant to uphold the street against all excavation beyond its track and bridge, as actually built. It was its duty to uphold the street about, and that means beyond its rails. The evidence shows that the wheels of the plaintiff's truck went down, not beyond, but between two timbers of its bridge.

So it is with the refusal to charge the supposition, that if the defendant constructed and maintained a strong and safe bridge between its tracks, and about fourteen inches on each side of them, and the injury was occasioned by an excavation under and beyond such bridge, it was not liable. The court had already charged that the defendant was not liable for an excavation beyond the limits fixed by the contract, but it held, as matter of law that the injurious excavation was within that limit. And we have agreed therein. Judgment affirmed.

ABSTRACTS OF RECENT DECISIONS.

ENGLISH, IRISH AND CANADIAN CASES.

THE APPOINTMENT OF A PERSON as manager of a public house is, *per se*, no holding out that such manager has implied authority to pledge his employer's credit.—*Daun v. Simmins*. English Court of Appeal. 28 W. R. 129.

WILL — CONSTRUCTION — GIFT OVER BEFORE ACTUAL RECEIPT OF SHARE. — There is no rule which prevents a testator, after giving an absolute interest in a share of his estate, from making a valid gift over of such share in the event of the first taker dying before the actual receipt thereof. Martin v. Martin, 16 W. R. 986, L. R. 2 Eq. 404, disapproved of. —*Johnson v. Crook*. English High Court, Chy. Div. 28 W. R. 12.

NEGLIGENCE— LIABILITY FOR ACT OF ONE COMPULSORILY IN CHARGE OF DEFENDANTS PROPERTY. —The owners of a steam tug which has been pronounced to be alone to blame for a collision are not exonerated from liability, notwithstanding that it is proved that the collision was solely attributable to the default or neglect of a duly licensed pilot compulsorily in charge of a vessel in tow of the steam tug at the time of the collision.—*The Mary*. English High Court, Adm. Div. 28 W. R. 95.

WILL—CODICIL — REVOCATION — RE-EXECUTION OF WILL.—The testator executed a will and a codicil thereto, and afterwards re-executed the will with certain omissions. The will contained a clause revoking all previous wills. The attestation clause of the will as re-executed contained no reference to the codicil. *Held*, that the codicil was not revoked by the re-execution of the will. *Re Rawlins*. English High Court, Probate Div. 28 W. R. 139.

WATERS AND WATERCOURSES—SALE OF WELL AND RIGHT TO WATER THEREFROM — DIVERSION.—The defendant sold to the plaintiff a well and the right of conveying the water therefrom through a pipe under the defendant's land without any interruption or disturbance by the defendant, his heirs or assigns, or any other person or persons whatsoever. A railway company purchased from the defendant land in the proximity of the spring, without recourse to their compulsory powers. The effect of the works of the railway company was to drain the water from the land before it reached the spring, in consequence of which the spring became dry and the water did not flow through the plaintiff's pipe. The plaintiff sued the defendant for breach of contract. *Held*, that defendant had only conveyed the flow of the water after it had reached the spring, and therefore the draining of the water before it reached the spring was no breach.—*Brain v. Marfell*. English Court of Appeal. 28 W. R. 130.

LANDLORD AND TENANT—NOTICE TO QUIT—SUFFICIENCY OF NOTICE—OPTION.— A landlord gave to his tenant a notice to quit in the following terms: "I hereby give you notice to quit and deliver up possession of the shop, premises and show rooms situate and being No. 20 Moss street. Liverpool (and now held by you as tenant from me), on or before the first day of May next, 1878. And I hereby further give you notice

that should you retain possession of the premises after the date before mentioned, the annual rental of the premises now held by you from me will be £160 payable quarterly in advance." *Held*, by Bramwell and Cotton, L.JJ. (dis. Brett, L.J.), that the notice to quit was sufficient, for the first paragraph contained a good notice to determine the tenancy, accompanied but not vitiated by the offer of a new tenancy contained in the second paragraph.—*Ahearn* v. *Bellman*. English Court of Appeal. 27 W. R. 928.

PATENT—INFRINGEMENT—ACTION AGAINST MASTER OF SHIP—USER.— An action was commenced against the master of a ship, The P, which was fitted with pumps alleged to be an infringement of a patent of the plaintiffs. The P, which was so fitted before the defendant was appointed master, had only been one voyage, and the pumps had not been worked within British waters. The master defended the action, having obtained an order that the firm who supplied the pumps should be made co-defendants. *Held*, per Cotton and Brett, L. J. (James, L. J. diss.), that an injunction would lie against the master to prevent his future use of the pumps. Per James, L. J., that the court could not grant an injunction against the master in the absence of the owners, and that if such an injunction were granted the master would not be justified in obeying it in the case of an emergency at sea. Decision of Bacon, V. C., affirmed.—*Adair v. Young*. English Court of Appeal. 28 W. R. 85.

UNITED STATES SUPREME COURT.

October Term, 1879.

INTEREST ON OVERDUE NOTE. — If payment of a note be not made when due, there is a breach of contract and the creditor is entitled to damages, of which the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon no other. In the absence of a stipulation that the contract rate should continue, no such intendment can be inferred.—*Holden v. Freedman's Savings Co*. Appeal from the Supreme Court of the District of Columbia. Opinion by Mr. Justice SWAYNE. Decree affirmed. 8 Wash. L. R. 6.

CHARITABLE TRUSTS — BEQUEST TO BISHOP OF ROMAN CATHOLIC CHURCH, WHEN VOID.—Testatrix by will bequeathed certain property "to Richard V. Wheelan, bishop of Wheeling, Va., or his successor in said dignity," the testatrix adding, "who is hereby constituted a trustee for the benefit of the community (previously described as a religious community attached to the Roman Catholic church), of which I may die a member, the said property or money to be expended by the said trustee for the use and benefit of said community. Testatrix died a member of a religious community attached to the Roman Catholic church, known as the Sisters of St. Joseph. This was an incorporated association. *Held*, that by the law of Virginia the bequest was void. The gift was to the office of the bishop of Wheeling, and as the bishop was not a corporation sole no person existed capable of taking it. If a trustee should be appointed to uphold the trust, the community not being a legal association could not enforce the trust, nor could any of its members, they being uncertain. Even if it should be considered a charitable bequest, under the law of Virginia it would not be upheld. Cases referred to: Baptist Association v. Hart's Exrs., 4 Wheat. 1; Vidal v. Girard's Exrs., 2 How. 127; Wheeler v. Smith, 9 Id. 55; Seaburn's Exrs. v. Seaburn. 15 Gratt. 423; Gallego's Exrs. v. Attorney-General, 3 Leigh, 450. — *Kain v. Gibboney*. Appeal from the Circuit Court of the United States for the Western District of Virginia. Opinion by Mr. Justice STRONG. Decree affirmed. 21 Alb. L. J. 55.

MUNICIPAL BONDS—WHEN IRREGULAITY IN ISSUE NO DEFENSE.—In an action by a *bona fide* holder for value, without notice, upon bonds issued by a town in aid of a railroad, it was objected to the validity of the bonds that the provisions of the statute authorizing their issue had not been complied with by the agents of the town intrusted with such issue. The bonds recited on their face that they were issued "in pursuance of an act of the legislature of New Jersey, approved April 9, 1868, entitled an act to authorize certain townships, towns and cities to issue bonds" and to take the bonds of the Montclair "Railway Company." The interest on the bonds was paid by the town for several years after their issue, their validity being questioned by no one. *Held*, that the objection could not be sustained. When one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him and not upon the other party. Hern v. Nichols, 1 Salkeld, 289; Merchant's Bank v. State Bank, 10 Wall. 646. In the case of Town of New Orleans v. Platt, decided at last term and not yet reported, this court said: "The bonds in question have all the properties of commercial paper, and in view of the law they belong to that category. Murray v. Lardner, 2 Wall. 110. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. Mercer County v. Hackett, 1 Wall. 83; San Antonio v. Mehaffy, 96 U. S. 312; County of Moultrie v. Saving Bank, 92 Id. 631; Moran v. Commissioners, 2 Black, 722; Knox v. Aspinwall, 21 How. 539; Royal British Bank v. Tarquand, 6 Ellis & B. 327." These rules are the settled law of this court, and they are decisive of the case in hand. *Inhabitants of Pompton v. Cooper Union*. In error to the Circuit Court of the United States for the District of New Jersey. Opinion by Mr. Justice SWAYNE. Mr. Justices FIELD and BRADLEY dissenting. Judgment affirmed. 21 Alb. L. J. 33.

CHATTEL MORTGAGES—STATUTORY REQUISITES—BANKRUPTCY—CONVEYANCE TO WIFE.—1. The New York statute in relation to chattel mortgages construed. *Held*, that a chattel mortgage by a firm upon firm property is void as against creditors, subsequent purchasers and mortgagees in good faith, unless filed in the towns or cities where the individual members of the firm respectively reside. It is not sufficient to file in the town or city where the partners conduct the firm business. 2. But such mortgages are good as between the parties without being filed. 3. A bankrupt caused a conveyance of real estate to be made to his wife several years before the commencement of proceedings in bankruptcy. It was a gift from him at a time when he had the right to make it. Within the four months preceding the bankruptcy, the wife and husband conveyed to a creditor of the latter, and the consideration was credited on the debt held by the grantee against the husband. *Held*, that the assignee in bankruptcy could not complain of such transaction, and the property was not subject to the general debts of the bankrupt. 4. Within four months preceding bankruptcy, the lessor of a hotel, holding as security for rent sundry

chattel mortgages from the bankrupts, upon the personal property in the hotel, which mortgages were good as between the parties, although void under the statute against creditors, accepted real estate at a fair valuation, in payment of a part of the back rent, and thereby extinguished his lien upon the mortgaged property. By the terms of the mortgage, the lessor at that time could have taken the mortgaged property into his custody and sold it for rent. *Held*, that as the arrangement was made in good faith, without any intention to defraud or to give preference to the lessor, the transaction should be regarded as, in substance and effect, an exchange of securities.—*Stewart v. Platt.* Appeal from the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Justice HARLAN. Decree reversed. 8 Wash. L. R. 2.

KENTUCKY COURT OF APPEALS.

November, 1879.

CITY ORDINANCE AS TO STOCK RUNNING AT LARGE—RIGHT TO HEARING ON QUESTION OF FORFEITURE.—1. The charter of the town of Lagrange authorized the trustees to enact such ordinances and by-laws providing for the health and comfort of the citizens, and for the safety of property and abatement of nuisances, as they might think proper. The trustees passed an ordinance providing that it should be unlawful for hogs to run at large during certain months, and concluding: "Any person permitting their hogs to run at large shall be subject to a fine of one dollar for each and every offense for each hog and pig. It shall be the duty of the town marshal, upon being notified or knowing of hogs being on the streets, to put them in a lot, and advertise them for three days, and to offer them at public sale to the highest bidder, for cash; and after paying the expense thereof, to pay over to the rightful owner the balance if any." *Held*, that although it is generally held that the right to adjudge a forfeiture of stock running at large in violation of an ordinance should be plainly conferred (Phillips v. Allen, 41 Pa. St. 482; White v. Tallman, 2 Dutch. 67; Cotter v. Doty, 5 Ohio, 393), yet in McKee v. McKee, 8 B. Mon. it was held that under a general grant of power to a council to pass all ordinances that might be deemed necessary or proper for the government of the city, an ordinance providing for the forfeiture and sale of stock running at large was enforceable. So it may be considered that under the authority of that case, the grant of such power may be reached by implication from the grant of such general powers as indicated. 2. But the ordinance in question is invalid for the reason that it does not provide any method by which it can be judicially determined that there has or has not been a forfeiture. "The power of the legislature, under the Constitution, to confer upon municipalities, for police and sanitary purposes, the right to control the use of the property of the citizen in such a way as may be conducive to the public good, and even to enforce a forfeiture by judicial proceedings when it becomes necessary, is not denied. It is insisted, however, that the right to forfeit without citation, and without hearing, can only exist from necessity. That right, in this instance, should not be extended beyond impounding the hogs. When that is done, the necessity for summary and precipitate action ceases, and judicial proceedings looking to forfeiture may then properly begin. If the ordinance has been violated, appellant may be compelled to pay the fees for impounding and keeping the hogs, but their payment can not be enforced by forfeiture, without judicial determination." Poppen v. Holmes, 44 Ill. 362; Darst v. People, 51 Ill. 286; Heise v. Columbia, 6 Rich. 404; Whitfield v. Longest, 6 Ired. 268; Donovan v. Mayor of Vicksburg, 29 Miss. 248; McKee v. McKee, 8 B. Mon. 433; Jarman v. Patterson, 7 Mon. 647. Judgment reversed. Opinion by HINES, J.—*Varden v. Mount.*

HOMICIDE — SOMNAMBULISM — RESPONSIBILITY FOR UNCONSCIOUS ACT.—F and W entered together at night a public room of a hotel, sat down and went to sleep. W awoke shortly after and called to S, one of the porters, for a bed for himself and F. W then attempted to awaken F by shaking him, but failing, asked S to wake him up. S thereupon shook F with great force and succeeded in awakening him. While S was holding him by the coat collar, and telling him to go to bed, F drew a pistol from his pocket and shot S, killing him. F then went out of the room with the pistol in his hand, his manner being that of a frightened man, saying that he had shot some one but did not know whom. F did not know nor had ever seen S before. On his trial for the murder of S, F offered to prove that he had been a sleep-walker from infancy; that he had to be watched to prevent injury to himself; that frequently, when aroused from sleep, he seemed frightened, and attempted violence as if resisting an assault, and for some minutes seemed unconscious of what he did or what went on around him; that sometimes, when partly asleep, he resisted the servant who slept in the room with him as if he supposed the servant was assaulting him. He also offered to prove by medical experts that persons asleep sometimes act as if awake. He likewise offered to prove that his life had been threatened by a person living near where he had been on business during the day, and that he had on that morning borrowed the pistol with which he shot the deceased, and had stated at the time that he was required to go near to where the person lived who had threatened him, and he wanted the pistol to defend himself in case he was attacked. The court rejected all this proffered evidence, and the prisoner excepted. *Held*, error. If the prisoner, when he shot the deceased, was unconscious, or so nearly so that he did not comprehend his own situation and the circumstances surrounding him, or that he supposed he was being assailed, and that he was merely resisting an attempt to take his life or do him great bodily injury, he should be acquitted. Reversed. Opinion by COFER, J.—*Fain v. Com.*

SUPREME COURT OF VERMONT.

February Term, 1879.

NEGLIGENCE— CARELESS USE OF PYROTECHNICS —CONTRIBUTORY NEGLIGENCE.—In case for negligence, it appeared that defendant, a lad thirteen or fourteen years old, was discharging fireworks in the evening in a village street, in the presence of a large concourse of people, old and young, when some of the crowd having gathered so close as to obstruct the view of others, some one called out for them to stand back and for defendant to direct the discharge "down street," whereupon defendant who was in the act of discharging a Roman candle, and had discharged two balls up street at a high elevation, turned the candle down street and lowered it so that a third ball went just over the heads of the people, and a fourth went still lower and struck and injured the plaintiff's son, a

lad of about the same age, who stood at a little distance by the road-side, and not in that part of the crowd that was nearest to defendant, nor exposing himself to injury except by being where he was. Defendant requested the court to charge that plaintiff could not recover if his son's negligence contributed to the injury, nor unless defendant was guilty of gross negligence, nor unless defendant failed to exercise such care as a person of his age should; and that defendant could not be held to the same degree of care as a person of full age and strength of mind. The court charged that if the injury was the result of negligence or recklessness on the part of the defendant, the case was made out, and, in effect, that negligence should be determined with reference to the dangerousness of the material that was being used. *Held*, that as there was nothing to show that defendant was so young as to be irresponsible, and nothing to show contributory negligence on the part of plaintiff's son, and as the act was voluntary, there was no call for the charge requested and no error. Opinion by REDFIELD, J.—*Bradley v. Andrews*.

MASTER AND SERVANT—CONTRACT OF APPRENTICESHIP—CONSTRUCTION—NOVATION.—1. Plaintiff apprenticed himself to the defendant for a term of years, "to learn the art and trade of finishing marble, but to do such other chores and labor when required," as might be necessary to defendant, and covenanted to "serve his master faithfully, * * * * obey his lawful commands," and behave himself in all things as a faithful apprentice should. After plaintiff had worked awhile, defendant requested him to go into the cellar under the shop and open and repair a drain, that the water might run off. Plaintiff refused, whereupon defendant refused to give him further work till he had done as requested, although plaintiff was willing and offered to continue. Plaintiff thereupon brought assumpsit in common counts. *Held*, that the service required came within the express terms of the contract, and was, besides, such service as might reasonably be required of an apprentice in the absence of express stipulation, and that the contract was entire, so that if wrongfully broken by plaintiff he could recover nothing, but if by defendant he could recover compensatory damages. 2. Before plaintiff began work he made a written assignment of his wages, which defendant accepted, promising to pay to the assignee whatever might become due to plaintiff under the contract. *Held*, that there was a complete novation of parties, whereby the right of action was vested in the assignee, so that he alone could sue. Opinion by REDFIELD, J.—*McPeck v. Moore*.

LIBEL—PROCEEDINGS OF CHURCH ORGANIZATION PRIVILEGED.—When a defamatory communication is fairly made in the discharge of some public duty, moral or social, the occasion prevents the inference of malice that the law ordinarily draws from such a communication, and affords a qualified defense, depending on the absence of actual malice. Thus, in case for libel it appeared that the Windham County Association, of which plaintiff and defendant were members, was an association of congregational ministers, organized in accordance with congregational usage, and having an association covenant and by-laws, to which any congregational minister residing in the county and of good standing might, by vote of the association, be admitted, and from which, on removal from the county, he might be dismissed by a letter commending him to other like associations in other counties; and that such associations were recognized by congregational churches, and membership thereof was considered among the churches as evidence of good ministerial standing. At one of its regular meetings the association, being actively incited thereto by the defendant, adopted by a unanimous vote the following preamble and resolutions; "Whereas, charges of untruthfulness, deception and creating disturbances among the churches have been made against Rev. David Shurtleff [the plaintiff], a member of this body, therefore resolved, that we hereby withdraw fellowship from him till the 7th day of August next, at which time he is invited to appear before our body, at Wilmington, and show reason why he should not be finally dismissed without papers. Resolved that the scribe be instructed to send a copy of this minute to the brother, and also to the *Congregationalist* and the *Vermont Chronicle*." Agreeably to the vote and resolutions the scribe sent copies thereof, showing the votes, including the defendant's, to the newspapers referred to, and they were therein published. It appeared that the former of those newspapers was a denominational paper published at Boston, Mass., and circulated among Congregationalists throughout New England; that the latter was a like paper published at Montpelier, Vt., and circulated among Congregationalists in Vermont; and that both were at the time of the publication organs of Congregational churches, and of organizations and institutions connected therewith. For several years prior to the publication complained of, reports of difficulties between plaintiff and his parishioners were in circulation, and defendant had received letters in relation thereto from time to time from ministers and parish committees in various places where plaintiff was preaching, giving unfavorable accounts of his career, and some of them speaking of him as unfit for the office and work of the ministry, and asking defendant to do what he could to restrain him. *Held*, that defendant's action before, and as a member of the association, and the publication of the preamble and resolutions which were the result of that action were privileged. *Held*, also, that the burden of proof as to whether defendant was actuated by actual malice was on plaintiff. Opinion by POWERS, J. *Shurtleff v. Stevens*.

SUPREME COURT OF IOWA.

December, 1879.

HOMESTEAD—"HEAD OF A FAMILY."—W was a widower who, after the death of his wife, continued to keep house as before. His son and son's wife lived with him, he having full charge of the household affairs, and they paying no board or compensation to him for their living. He employed a domestic. The son had lived with him before his marriage, and no change had been made in their relations afterwards, *Held*, that W was the "head of a family." Code, § 3079. A family is "the collective body of persons who live in one house, under one head or manager." The relation existing between such persons must be of a permanent and domestic character, not abiding together temporarily as strangers. There need not of necessity be dependence or obligation growing out of the relation. Code, § 3073, provides that the word "family," used in the preceding section, does not include strangers or boarders lodging with the family. This would seem to imply that the term does include persons living in the family who are not strangers or boarders. The son and his wife were neither strangers nor boarders, but lived with the father, who provided for them as for children or dependents. Smyth's Homestead and Exemptions, §§ 520, 147, 68, and notes. It is not disputed that if there were a family in W's house he was its head. Judgment affirmed. Opinion by BECK, C. J.—*Tyson v. Reynolds*.

FIRE INSURANCE—"VACANT AND UNOCCUPIED."—A policy of fire insurance provided that it should become void if the building should be "vacant or unoccupied." Seventeen days before it was destroyed a tenant had moved out contrary to the expectation of the owner, who lived some distance away. *Held*, that the policy was avoided. "It is not a question as to how long this state of things may exist without the knowledge of the assured. He is bound by the terms of his policy to see to it that his house does not become vacant, or give notice, etc. Neither is it a proper inquiry as to whether the risk is increased by reason of the building being unoccupied. The parties have settled that question by their contract. The question as to whether the building was unoccupied for a reasonable or unreasonable length of time is wholly immaterial. The time is only material in determining whether the building is in fact vacant or unoccupied within the meaning of the contract. The only material consideration is, was this building vacant and unoccupied and did it so remain until destroyed by fire? Of course the terms of the contract must receive a reasonable construction. The parties did not intend that one tenant should not move out and another move in. Nor did they intend that the house should be deemed vacant if the occupant should close it and go off on a visit, and not occupy it for a reasonable time. But the evidence in this case tends to show that the building was actually unoccupied for seventeen days—not by reason of anything other than that one tenant left, and the house stood there awaiting another occupant. It was to all intents a vacant and unoccupied house when it was destroyed. It is immaterial how the house came to be vacated or unoccupied. The fact alone is sufficient. See Wustum v. City Fire Insurance Co., 15 Wis. 138: Harrison v. City Fire Ins. Co., 9 Allen, 231; Diehl v. Adams Co. Insurance Co., 58 Pa. St. 443. Reversed." Opinion by ROTHROCK, J.—*Dennison v. Phœnix Ins. Co.*

ACTION FOR WRONGFULLY CAUSING DEATH—CONTRIBUTION BY DECEASED.—Action by administrator for injuries caused to one Dunn, whereby he lost his life. The brief opinion sufficiently shows the points decided. ADAMS, J.: "Whether if Dunn had died solely from the use of the liquor, he would be deemed as having so far contributed to his death by his voluntary acts as to preclude a recovery, we need not determine. The petition states, and the evidence tended to show, that Dunn was expelled from the saloon at a late hour of the night, drunk and unconscious, and died by reason of exposure and cold. If it should be conceded that Dunn contributed to his death by drinking until he became drunk and unconscious, it would not follow that the plaintiff would not be entitled to recover. If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care, after the person is discovered in his exposed condition. If after that the company should be guilty of negligence, whereby the exposed person should be injured, the negligence of the company would be deemed the proximate cause of the injury. Morris v. Chicago, etc. R. Co., 45 Iowa, 29. So if the defendant negligently subjected Dunn to exposure to his injury, knowing that he was unconscious or even helpless, the defendant can not escape liability on account of Dunn's negligence prior to the wrongful acts whereby Dunn was subjected to exposure, however great Dunn's negligence may have been in allowing himself to become intoxicated. We think that the instructions should not have been given." Reversed. *Weymire v. Wolfe.*

SUPREME COURT OF MISSOURI.

December, 1879.

"DRAW POKER"-ACTION TO RECOVER MONEY LOST—JOINT LIABILITY.—Where A sues several defendants to recover money lost at the game of "poker," under Wag. Stats., p. 661, sec. 1, which provides that "any person who shall lose money or property at any game or gambling device may recover the same by civil action," an instruction asked by the plaintiff declaring the defendants jointly liable for the amount lost by him in the game, whether any conspiracy between the defendants to cheat plaintiff existed or not: *Held*, to have been properly refused, there being no evidence of any agreement between the defendants to divide among themselves what they might win from plaintiff. In the absence of evidence of such agreement or of the existence of any conspiracy to cheat him, each party in the game is only liable to a loser for the amount of money he may have won from him. Affirmed. Opinion by HENRY, J.—*Laythain v. Agnew.*

LEASE—LIABILITY OF LESSOR FOR CONDITION OF PREMISES — INJURY TO CHILD OF SUB-LESSEE.—T in 1871, owned a tenement house in Kansas City, and leased it in the spring of that year by the month to S, who without defendant T's knowledge sub-let one room to plaintiff's father. At that time there was a picket fence on the line of the lot fronting the street, which was removed by defendant while S and plaintiff's father occupied the house. There was evidence tending strongly to prove that in the spring of 1871 the fence was removed, and after its removal S quit the premises which were then leased to L, who, likewise, without defendant's consent or knowledge, sub-let a room to plaintiff's father. There was a verbal understanding between defendant and L that L might make any needed repairs, and the cost of the same should be deducted from the rent. In October, 1871, the plaintiff, a child of five or six years, while playing with other children on the side of the lot where the fence had been, fell down the embankment which was some seven or eight feet high and perpendicular in descent, and was severely injured. This action was to recover damages for the injuries thus received. *Held*, that if repairing the fence was embraced in the above agreement between defendant and L, then the failure to replace it was the fault of L, for which the defendant was not liable, but if it was not embraced in that agreement then defendant was under no obligation to L, direct or indirect, to replace the fence, and was therefore under no such obligation to L's subtenant, between whom and defendant there was no privity of contract. 56 N. Y. 398; 59 Barb. 497. On a lease of real estate there is no implied contract that the landlord will keep the premises in repair, or fit to be occupied. 7 Hill, 87; 10 Allen, 120. Nor could it be successfully urged that the defendant was a trespasser in removing the fence, and for that reason should be held liable in this action. This might be true so far as concerned the lessee in possession at the time of the removal of the fence, but a subsequent tenant could not complain of a trespass committed by defendant against a prior tenant. The evidence tended to prove while S, the prior tenant, occupied the premises the fence was removed and although plaintiff's father occupied a room under him at the time, yet when S's lease terminated and he quit the premises, which were then leased to L, there was a severance of relation between defendant and S and all persons then under S, and when plaintiff's father again went in under L, it was, so far as this case is concerned, as if he then for the first time occupied a portion of the premises. Reversed

and remanded. Opinion by HENRY, J.—*Peterson v. Smart.*

NUISANCE—WHEN FORMER RECOVERY OF DAMAGES THEREFOR A BAR TO ANOTHER ACTION—NON-JOINDER OF PLAINTIFFS — APPORTIONMENT OF DAMAGES AT TRIAL.—Action for damages for the diversion by defendant in 1873 of a stream of running water, whereby portions of plaintiff's land were in 1875 overflowed, his crops destroyed and his timber injured. Plea not guilty and a former recover, and verdict for plaintiff. Defenda nts introduced in evidence the pleadings in a suit for damages instituted against it by plaintiff in 1875, together with the instructions of the court, verdict of the jury and the judgment of the court thereon in favor of plaintiff. It was admitted that the land injured, the parties and the cause of injury were the same, the only difference being that the former suit was prosecuted for damages during the years 1873 and 1874, while the present one is for damages during the year 1875. The defendant contended that the cause of injury for which the former judgment was recovered was of a permanent character and that the entire damages for both past and future injuries could and should have been recovered in that suit, and that that judgment was therefore a bar to this action. *Held*, that the defence was insufficient. Where the injury is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and no other action can be maintained for the continuance of the injury. But where the wrong does not involve the entire destruction of the estate or its beneficial use, but may be apportioned from time to time, separate actions must be brought and a former suit will be no bar for damages suffered subsequently to the institution of that suit. 3 Fost. 83; 13 N. H. 28; 61 Mo. 367. The lands in this case lie north of defendant's railroad, and the stream diverted originally flowed along and a few rods south of said road. The defendants erected a dam and embankment across the channel of the stream, and made a ditch or culvert in the road bed through which the water of the stream was conducted on plaintiff's land. Portions of these lands were annually cultivated after the nuisance was created and the crops annually injured, so that the injury did not go to the entire value of the estate but was of yearly recurrence and varied in extent with the volume of water discharged from the land, and was therefore capable of being redressed by successive actions. It also appeared in evidence that in 1875, the period covered by this suit, plaintiff had rented the land to a tenant for a third of the crops. The petition contained no allegation that the rents were diminished by reason of the overflow, but did allege the partial destruction of the crops, and so far as it appears from the petition, that the plaintiff was the sole owner, and it was contended there could be no recovery on account of any loss of rent. *Held*, that no objection having been taken on account of non-joinder of the tenant as a co-plaintiff, the present plaintiff was entitled to have his damages apportioned at the trial. 1 Wend. 380; 8 Johns. 151; 6 Johns. 158. Affirmed. Opinion by HOUGH, J.—*Van Horzier v. Hannibal etc. R. Co.*

SUPREME COURT OF OHIO.

January, 1880.

BURGLARY—INDICTMENT.—An indictment charging that the prisoner broke into a store-room, is insufficient under a statute (74 O. L. 248, sec. 5), making it an offense to break into a "store-house;" and the defect is available to him, although the objection was not made until the verdict had been rendered. Judgment reversed. Opinion by OKEY, J.—*Hager v. State.*

LIBEL—PRIVILEGED COMMUNICATIONS—MALICIOUS PROSECUTION—EVIDENCE.—1. Where a petition states a good cause of action in tort, it is immaterial whether this remedy, at common law, would have been, in form, an action on the case or in trespass. 2. In an action for a tort, wherein punitive damages were recoverable, the judgment will not be reversed on the ground that evidence showing the pecuniary condition of the defendant was admitted. 3. The final judgment in an action for libel on the publication of an affidavit for a search warrant, is not a bar to an action for trespass in executing the warrant, where such warrant was void for want of jurisdiction in the court that issued it. 4. Where an action for libel in the publication of an affidavit for a search warrant has been defeated on the ground that the publication was privileged, the record of such case is not admissible in evidence, even on the question of damages, in a subsequent action between the same parties for a malicious prosecution, or for trespass in executing the search warrant. 5. In an action for libel founded on a writing published in the course of justice, the defense of privileged communication is not overcome by showing that the court in which the matter was published had no jurisdiction in the particular case then pending, by reason of the limitation of time, if such court had a general jurisdiction of the subject of the proceeding. 6. And for prosecuting such proceeding in such court, maliciously and without probable cause, an action for malicious prosecution will lie. 7. Where a prosecution is sought to be justified on the ground of advice of counsel, it is incumbent on the prosecutor to show that all the facts material to the prosecution known o him, or which might have been ascertained by reasonable diligence, were communicated to counsel. Judgment affirmed. Opinion by MCILVAINE, C. J.—*Lamprecht v. Crane.*

QUERIES AND ANSWERS.

[**** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

2. A and B, both residents of Illinois, are each owners of a patent. A claims that B's patent is an infringement on his, and serves an injunction on B to prevent him (B) from selling, and gives a good injunction bond, signed by residents of Illinois. On the hearing of the cause the injunction is dissolved. Query. Should B bring suit on the bond in the United States court, where the bond was filed, or in the circuit court, where the sureties reside, the plaintiff A being a fugitive from justice and his whereabouts unknown? J.

Oquawka, Ill.

3. A correspondent in Illinois writes: I desire to call the attention of this excellent journal to a practice which seems to be universal, and which has received from the courts of a large number of the States recognition, if not support; and if some one of its numerous able correspondents will take the time to write it up, it will, I have no doubt, prove interesting to the

profession. The practice I refer to is that of municipal corporations, under the provisions of statutes authorizing special assessments, or special or local taxation, for local improvements, making such special assessment or tax a personal liability upon the owner of the property claimed to have been benefited by such local improvement. The point is, that the assessment in its nature is local, but being made a personal liability or charge, it of necessity becomes general, and in such case the improved property might be exhausted by sale to pay the same, and still leave a balance over to be paid by the owner after losing his land. Can such a thing be legally done?

ANSWERS.

43. [9 Cent. L. J. 439.] An execution under the Landlord and Tenant Act. sec. 35, is in two parts. Part first is a writ of "*habere facias possessionem*," and needs no return day. Freeman on Executions, sec. 471. Part second is a writ of "*fieri facias*" and must be returnable according to law. Stevens v. Chouteau, 11 Mo. 382. Obviously, these commands are not dependent on one another. Hence, one may be void, the other valid. To order money to be made in five days on execution is void, the law giving sixty or ninety days. To order the delivery of property to the landlord in five days is repeating the statute, and is valid. Suppose the day after judgment defendant paid the debt and costs, before execution made out, and that plaintiff insisted on his writ for possession after this; or suppose judgment for possession alone. Then would execution run five, sixty or ninety days? Or would it matter which? Clearly it is immaterial. Neither constable nor defendant can be damaged nor complain, and the reason of Stevens v. Chouteau does not apply. Hence the constable must give possession or he is liable. —— C.

45. [9 Cent. L. J. 440.] If C was the agent of A, as the language would seem to imply, then the deed from B to A was properly delivered and the title passed. In which case the notes were discharged by accord and satisfaction. It is merely a question as to whether the deed from B to A was delivered. M.

48. [9 Cent. L. J. 460.] My opinion is that he can not recover vindictive damages on an attachment. In the first place nothing of the kind is contemplated, and in the next only actual damages can be recovered, as is well laid down in Drake on Attachment, sec. 175. He there sets out that "it must be the natural, proximate, legal result or consequence of the wrongful act." B can not recover vindictive damages from either A or D and E securities. Expense and losses in making defense to attachment may be recovered, as well also the loss occasioned by being deprived of the use of his property; counsel fees in the attachment suit, if paid; costs of suit. Drake on Attachment, sec. 176 and notes. The form of judgment should be the amount of the bond conditional to be satisfied on payment of the amount of damages found by the court or jury. 7 Ills. 361, 11 Id. 452, 562, 25 Ills. 208, 602. Querist does not give his own State or I could refer him to authorities. G. S. D.
Bushnell, Ill.

50. [9 Cent. L. J. 500.] 1. The acknowledgment is valid. The fact that the notary is one of the beneficiaries under the mortgage does not disqualify him from taking and certifying the grantor's acknowledgment. Waite, C. J., in 14 Bankrupt Reg. 513. 2. In the absence of statutory provisions to the contrary, the mortgage deed is valid between the parties though defectively acknowledged, or even without any acknowledgment. 1 Cranch, 239; 3 McLean, 362; 2 Scam. 315; 2 Scam. 371; 63 Ill. 288. R. W.

CURRENT TOPICS.

"Gentlemen in the profession," once said a certain chancellor, "should not allow their tempers to get the better of them, nor forget that they are gentlemen, and they should act as such one towards another." Within the past few weeks the courts of our city and the public that crowd them, have been called upon to witness more than one personal encounter between attorneys engaged in the trial of a cause. Whether it be calling the opposing counsel a liar, or hurling a missile at your antagonist, or engaging in a scuffle with him, matters little—they are all out of place in a court of justice, and those who make such spectacles possible have but little regard for the good name of the profession or for the feelings of their brethren. We do not desire to say much on this subject which is at best a painful one. The courts fortunately have it in their power to check, and if they be resolute, to entirely prevent this manner of conduct. Such behavior should be visited with a fine and this fine should be collected in all cases, for a penalty which is not intended to be enforced is not a punishment but a farce. We are glad to see that in the last of the cases to which we have referred, one of our judges has shown that he intends that the contempt of court shall not go unpunished. A judge who will adhere to this resolution in such a case will be certain of the support of the whole bar with hardly an exception. For if members of the bar will not conduct themselves with decorum and decency, what can we look for from the public but a sure continuance of that disrespect into which the profession of the law has, in some quarters, certainly fallen?

Among the legal abuses of the present day, the appointment of receivers and the management of railroads by the courts, are particularly prominent. It may have been well enough for the Courts of Chancery of England and Ireland to have taken charge of landed estates and manage them for a time through a receiver. Persons who had no desire to deal with him or become parties to a suit in chancery could avoid him; but a railroad is a public necessity, and its control by a court is not alone a matter of interest to the parties to the proceedings. Every person who travels over the line, who ships freight or sells produce, or who lives along the road, involuntarily becomes interested in the litigation. The attempt to adapt the cumbrous and sluggish machinery of a court of equity to the management of the most active of all commercial inventions is a signal failure, damaging to the people, the litigants and the property. It has given rise to constant and violent complaints from the bondholders whose interests the receivers are appointed to protect, and amid the din of their complaints the injury inflicted on the general public is overlooked and forgotten. The courts themselves do not escape injury in attempting the management of property for which they are in the very nature of things unfitted. But the greatest of all sufferers bear in silence and are in danger of being forgotten. The receiver is the officer of the court, and the court is inclined to regard it as a matter of duty to support him at all hazards. To vindicate him is to sustain itself. He makes contracts by the thousands. He employs workmen by the hundreds. The operation of a railroad necessarily gives rise to frequent disputes in regard to loss of and damage to property. Many personal injuries occur, and whether a railroad is in the hands of a receiver or a corporation, causes of litigation will necessarily be

frequent. If the railroad is in the hands of its owners all these matters will either be speedily adjusted by the parties, or else suits may be brought and the issues tried in the courts. But a railroad receiver is a nabob. He assumes to place his own construction on all his contracts and to determine the rights of all complaining parties. If the amounts in controversy are small the sufferer bears his ills rather than follow the path marked out for him by the courts. If the amount is large, he must humbly ask of a judge leave to sue the receiver, and the judge will grant him leave to have an examination *pro interesse suo* before a master in chancery, and a full trial must first be had to see if he shall be permitted to bring suit at all, and his right to a jury trial is thus practically taken away. Worn out with delay he finally abandons his claim, and when the receiver makes his annual report it is spoken of with pride by the court as showing how advantageously a railroad may be operated in chancery. Honest and just claims are smothered out, and the saving thus effected is cited as evidence of the economy of equitable management. An employee is crippled by a defective bridge, and the court permits him to have an examination *pro interesse suo* to see if he shall be permitted to sue the receiver, and requires him to give a bond for costs before even that examination can be made. If the crippled employee has friends who will secure the costs for him he is finally permitted to bring suit. If he should bring suit in a State court, the Federal judges will arrest him and his attorney on the complaint of the receiver, and fine them for contempt.

This practice in the Federal courts became so shameful that the Supreme Courts of several of the States have held that suit might be brought in the State courts against a receiver without leave. The Supreme Court of Iowa so held in the case of Allen v. Central R. R. Co. 42 Iowa 683. Other States have realized the necessity of some modification of the old rules of practice in chancery when applied to this kind of property and have held the same doctrine. Kinney v. Crocker, 18 Wis. 74; Paige v. Smith, 99 Mass. 508; Camp v. Barney, 4 Hun, 373; see also Railroad Co. v. Brown, 17 Wallace 446. But the Federal courts are independent of the precedents of the State judiciary, and the unfortunate litigant who attempted in Iowa to act on the decision of the Supreme Court found that the Federal judges were determined to protect their receiver from suit, and in the case of Thompson v. Scott, 3 Cent L. J. 737, a single Federal judge of the Iowa District repudiated and overruled the doctrine of Allen v. Central R. R. Co. and ordered an attachment to issue against the plaintiff unless he should abandon his suit in the State court. The abuse calls for relief. If the bondholders are not benefitted and the system is inimical to the commercial interests of the country, why should it not be swept away? The remedy is a simple one. Let Congress take away the power of the United States courts to appoint railway receivers altogether. If a receiver should become essential in any case, let the proceedings be commenced and confined to the State courts, where the receivership will be but brief and where any of the evils of this system can be more readily cured by State legislation. Pegasus yoked with an ox has long been an emblem of unfitness and incongruity. A locomotive following a court of chancery is a more modern example.

NOTES OF CASES.

A decision concerning the fees of stenographers, and one which it is said will do away with a long-standing abuse, by which appeals in the New York courts were rendered unnecessarily expensive to litigants, was rendered in the recent case of *Wright v. Nostrand*, 17 Daily Reg. 17, and will doubtless be of interest to practitioners generally. In this case a motion was made to compel Mr. Parkhurst, the official stenographer of the court, to furnish to Mr. Wilder, one of the defendants attorneys, a copy of his minutes of the trial. It appeared that defendants' attorneys had ordered an official copy of the minutes, which the stenographer had refused to write out, unless paid the sum of $90 in advance as his fees. The defendants' attorneys demurred to this charge as exorbitant and inquired of the stenographer at what rate per folio he computed his fees and how many folios of testimony he had taken, to which Mr. Parkhurst replied that his fees were computed at fifteen cents per folio, and that he did know precisely how many folios there would be, but by a process of "estimating" the same from the original minutes, he "judged" there would be about 600 folios, which at the rate of fifteen cents a folio would amount to $90. The defendants' attorneys refused to pay this sum. After a lengthy argument on the motion the court held that ten cents a folio was the legal charge, and that the stenographer must content himself with that, and that the number of folios must be actually counted and not "estimated." It was also urged by the stenographer that he was entitled to payment of fees in advance, before he wrote out his minutes; and in justification of this plea he mentioned several instances in which attorneys after ordering the minutes had abandoned their appeals, and thus left the minutes on the stenographer's hands unpaid for; to guard against which result Mr. Parkhurst said he had adopted the uniform rule of requiring payment in advance in all cases. On this part of the case the court likewise ruled against the stenographer, ordering him to write out his minutes and make out his bill at the rate of ten cents per folio of 100 words by actual count, and to furnish the same to defendant's attorneys, adding "that attorneys, as well as stenographers, are officers of the court, and subject to its orders; and that in any case where it should be made to appear that an attorney had wrongfully refused to pay the legal charges of the stenographer the court would protect the latter by a summary order against the attorney."

In *Darland v. Taylor*, decided by the Supreme Court of Iowa on the 6th ult., the intestate of plaintiff held certain notes of defendant, who was her grandson. One night shortly before her death she destroyed the notes, and subsequently made frequent declarations to the effect that she did not wish the defendant to pay them after her death. This was held to be a valid *donatio mortis causa*, reversing the opinion of the court below, which was grounded upon Burney v. Ball, 24 Ga. 505, where it was said: "Our opinion is that the declarations of the donor that he had given are always admissible in evidence in cases of this sort. We have heretofore held, and still hold, that they are insufficient of themselves to establish a gift. To constitute a good and valid gift there must be a delivery, actual or constructive, or, as it is termed sometimes, symbolical, or a writing." In reversing the case, Day, J., who delivered the opinion of the court, said: "It is evident from the Georgia case that the court simply determined that the decla-

rations of a donor that he had made a gift is not sufficient without some proof of delivery, actual or constructive. It is not held nor intimated that the declaration of the donor is not admissible to establish the facts from which a delivery may be inferred. That such facts may be established by the declaration of the donor we do not doubt. The court further held that there was no delivery or acceptance of the gift, and that both are necessary. The authorities hold that the delivery may be actual or symbolical. In Grangiac v. Arden, 10 Johns. 292, a father bought a ticket in a lottery, which he declared he gave to his daughter, and wrote her name upon it. After the ticket had drawn a prize he declared that he had given the ticket to his child and that the prize money was hers. This was held sufficient to authorize a jury to infer all the formality requisite to a valid gift, and that the title to the money was complete and vested in the daughter. In Gardner v. Gardner, 22 Wend. 525, a debt contracted by the wife was held to be discharged as a gift *causa mortis*, by the husband destroying the bond, the evidence of the debt, and declaring that the money was hers. See also Blasdel v. Locke, 52 N. H. 238. In Hillebrant v. Brown, 6 Tex. 45; where the father branded certain cattle in his son's name, and recorded the brand, it was held sufficient to establish a symbolical delivery. The destruction of the notes, together with the repeated declarations of the deceased that she did not intend the defendant to pay the debt, constitute a sufficient delivery under the authorities cited. As the gift was for the benefit of the donee, and coupled with no condition, his acceptance of it, from all the circumstances proved, in the absence of any opposing testimony, must be presumed. Blasdel v. Locke, 52 N. H. 238, 244. The court further held that the gift was made by the donor in apprehension of death before morning, and that as she did not die there was a revocation of the gift. The evidence does not at all sustain the position that the gift was intended to be operative only in the event of the death of the donor before morning. Upon the contrary, the evidence clearly shows that the deceased desired to discharge the defendant from liability upon the notes, and that the destruction of the notes was made at the time in question because she feared that she might die before morning, and thus be prevented from discharging the defendant as she desired. Afterwards, and during her last sickness, and but a short time before her death, the deceased declared that she had destroyed the notes so that defendant would get the property and that she intended him to have it. There was not, we think, any revocation of the gift."

RECENT LEGAL LITERATURE.

RECENT REPORTS.

The sixty-eighth volume of the Missouri reports contains over one hundred cases, embraced, exclusive of index, in 665 pages. The opinions reported were all delivered at the October term of 1878; and the most important ones being already familiar to our readers through these columns, we refrain from referring to them at any length. So far as the reporter's and publishers' work are concerned it is a most satisfactory volume, the syllabi, statement of facts and arguments of counsel wherever given, being clear, concise and correct, and the paper, press work and binding being all that the profession can desire. We can not help thinking, however, that it would have been even more satisfactory had some half dozen cases been omitted altogether. Why should the bar be compelled to pay for a printed report of a case which decides nothing new or disputed, and which will certainly never be cited again in any case? If the judges would exercise a reasonable discretion in selecting cases to be reported, there are few lawyers but what would be glad of it. If the reporter were invested with this right it would be still better, as there will always be a temptation for the judges to exhibit in print the records of their industry at the expense of the profession.

In the fiftieth volume of the Texas Supreme Court reports just issued we note the following decisions of general interest: Railroads may adopt regulations preventing passengers from interrupting their trip without obtaining a "stop over" check. *Breen v. Texas etc. R. Co.* 43. A bankers safe, even if inclosed within a vault the walls of which would have to be partially taken down to effect its removal, is a removable fixture. *Moody v. Aiken*, p. 65. For the negligence of a contractor in omitting to erect stock-guards and fences during the construction of the road, the railroad corporation is liable. *Houston etc. R. Co. v. Meador*, p. 77. A donee of an heir is not a "person interested in the estate" within the statute permitting suits to set aside wills. *Ransome v. Bearden*, p. 119. In *Houston etc. R. Co. v. Randall*, the plaintiff, a brakeman on the defendant's road, sued the company for damages caused by a car running over his arm, which rendered it necessary to amputate it. He obtained a verdict of $12,000, which the Supreme Court refused to disturb. "The court," says Moore, C. J., "should not interfere merely because it thinks the verdict too large."

Just six weeks ago we noticed the fortieth volume of Mr. Chaney's Michigan reports, and now another volume is on our table. It embraces the decisions of that State up to the end of October, 1879. The Michigan bar may be regarded as peculiarly fortunate in being able to have the reports of their State supplied to them with such promptitude.

THE MAGAZINES.

The first number of the new series of the *American Law Review* contains articles on Trespass and Negligence, and Trustees as Tort Feasors, from the pens of O. W. Holmes, Jr., and A. G. Sedgwick. The decision of the Supreme Judicial Court in Weld v. Walker, on the law of burial, is annotated by F. L. Wellman. A review of six books and notes of legal topics conclude its contents.——The first number of a magazine which will be of much service to the criminal lawyer is just issued. It is called the *Criminal Law Magazine*, and is to be published bi-monthly at Jersey City, N. J. The contents of the initial number are a lengthy article of forty-five pages on Presumptions in Criminal Cases, by Francis Wharton; five cases reported in full and annotated, and a digest of recent criminal adjudications covering twenty pages. Its editors are Stewart Rapalje, of the New York bar, and Robert L. Lawrence, of the Jersey City bar. Freder-

Reports of cases argued and determined in the Supreme Court of the State of Missouri. Thomas K. Skinker, State Reporter, Vol. 68, Kansas City; Ramsey, Millett & Hudson, 1879.

Cases argued and decided in the Supreme Court of the State of Texas during the Tyler term and part of the Galveston term, 1879. Reported by Terrell & Walker, Vol. 50, Houston; Horace J. Burke, 1879.

Cases decided by the Supreme Court of Michigan from June 3 to October 29, 1879. Henry A. Chaney, State Reporter. Vol. 41, Lansing; W. S. George & Co. 1879.

XUM

ick D. Linn & Co. are the publishers, to whom it is no greater compliment than they deserve to say that few magazines in the country present so handsome an appearance. We unhesitatingly recommend the work to the criminal practitioner.——*The Southern Law Review* for December-January is as valuable as usual. Fraudulent Mortgages of Merchandise, by Leonard A. Jones; Concerning Insurance Agents, by James O. Pierce, and Injuries to Children and The Rule of Imputed Negligence, by Edwin G. Merriam, are the leading articles, and they are all well worth a careful study. The book reviews this month are sharp and aggressive.

NOTES.

——The length of the chancellor's nose has been more than once noted, why then should not the peculiarities of a chancellor's nose be recorded? "When I was a young man," says a writer in the *Leisure Hour*, "my avocations led me frequently to Lincoln's Inn. I would drop occasionally in at the Chancery court, and have a look at Lord Brougham as he sat leaning backward, with his eyes closed, listening to the endless droning and drumming of the lawyers mouthing, or rather mumbling, their interminable pleas. At first sight his lordship appeared to be asleep, but a close inspection would show you that the muscles at the tip of his nose were in a state of rapid and continual agitation. There was no motion of the nostrils, not the least, but an unceasing vibration of the small muscles terminating the organ, reminding me strongly of a captive rabbit nosing at the wires of his hutch. Having once remarked it, I naturally looked for it at each opportunity, and never missed seeing it save when his lordship was visibly occupied with the business before him, either questioning counsel or witnesses or addressing the court. Of course he was not asleep as he lay back with closed eyes; indeed, it was well known that at such times he was wide awake, and thoroughly mastered the business in hand. Though his lordship's accomplishment, if it was one, is by no means common, it is not so rare as might be supposed, and I believe that many persons possess and exercise it without, so far as one can judge from observation alone, being concious of it."

——A rather uncommon suit is in progress in New York for $60,000 damages for injuries received from eating ham sold by the defendant in which trichinæ were present. The following defenses were set by the defendant which the plaintiff asked to have struck out, viz.: (1) That trichinosis results from eating uncooked animal food. (2) There was negligence in so eating uncooked animal food. (3) That ordinary cooking would have destroyed the trichninæ. (4) That no harm would result from eating cooked trichinosed food. (5) Trichinosis resulted from neglect in not preparing the food by heat. The motion of plaintiffs to strike out was based on the following grounds: That the defense is frivolous, as the food complained of is alleged in the complaint to have been smoked ham, while the answer refers to uncooked raw meat; that it was inconsistent with the first defense; that the court should take judicial notice of the latest discoverles in science; that raw, uncooked animal food will not produce trichinosis, but on the contrary is good and wholesome; that the use of raw animal food was universal, and has prevailed from time immemorial; that ordinary culinary operations will not destroy *trichinæ spiralis*; that eating trichinosed meats, even when the animals have all been destroyed, is a dangerous and disease-producing practice; that meats sold for domestic use were presumed to be sound and wholesome, and that the purchaser was not bound to analyze, examine or otherwise inspect the same. Decision was reserved by the court.

——In his "Reminiscences of a Journalist," Charles Congdon relates two hitherto unpublished anecdotes of Daniel Webster and Rufus Choate. Mr. Webster was employed in a somewhat singular case and came to the author's town to argue it. A young man of fortune who had killed himself by hard drinking had before his death given a number of promissory notes, the payment of which was disputed by the executor, for whom Mr. Webster was retained. The trial created great public interest, and the court-room was crowded to repletion. "At the time of which I am writing," says the writer, "he was the idol of the Massachusetts people. So my chance of getting into the court-room to hear his argument was limited; but his of getting in to make it, at one moment, did not seem to be much better. I was just behind him, and remember how I gazed with reverence at the two brass buttons upon the back of his blue coat. I recall nothing of his argument save one effective point which he made. A witness for the plaintiff, who was also a partner in the alleged conspiracy to defraud the maker of the notes, had been compelled to admit under Mr. Webster's rigorous cross-examination, that they had agreed 'to fling their chances together.' When he came to this point in his speech to the jury, the orator's eyes flashed, his nostrils dilated, while with a significant gesture and in a loud voice, he exclaimed: 'They agreed to fling their chances together; and they would be flung together out of any court of justice in Christendom!'" The other is of Rufus Choate's vehemence in oratory. He, Choate, was once opposing before a legislative committee, a project for giving the Boston and Providence Railway Company liberty to trespass upon the Common. Mr. Choate drew a beautiful picture of the beauties of that *rus in urbe*. "Here," he said, "when the vernal breezes blow, you may now walk with your wives and children, and drink in all the charms of reawaking nature. But grant the prayer of the petitioners, gentlemen, and what will you have? The scream of locomotives, the rattle of trains, the whirr of machinery—Stromboli, Vesuvius, Ætna, Cotopaxi—hell itself, gentlemen!"

——The opinion is gaining ground in England that the appeal of the Tichborne claimant will be successful. A correspondent writes to this country as follows: "I have had a conversation on the subject with a gentleman connected with the solicitor's department of the treasury, and his impression is that if argued there is a great probability that the decision of the judges will be given in the claimant's favor, as it is held by many of the most eminent counsel practising at the criminal bar that it was an error in law to sentence the claimant to two separate terms of seven years' penal servitude each for substantially one and the same offense. Of course, if the decision is in the claimant's favor he will become entitled to be set at liberty on the expiration of his first term of seven years, which, I believe, with good conduct means only six years three months, and which term is on the point of expiring. Judah P. Benjamin has been retained to argue the case for the prisoner.——A subscriber in Fremont, Nebraska, writes: "As a curiosity of the confusion of a witness the following I think is up to the best. A husband in his application for divorce, at the present term of our court, testified that he was fifty years old; that his wife was thirty-eight years old, and that they were married forty-five years ago. The judge granted the divorce notwithstanding the discrepancy in the figures."